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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186986
Party	Defendant Allen, Shaun Roberts
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Submission	Answer
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Date	11/24/2008
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<b>LOEST &amp; McNAMEE, INC.</b>	) <b>IN THE UNITED STATES PATENT</b>
	) <b>AND TRADEMARK OFFICE</b>
<b>Plaintiff/Opposer</b>	)
	)
<b>v.</b>	) <b>TRADEMARK TRIAL AND APPEAL</b>
	) <b>BOARD</b>
<b>SHAUN ROBERTS ALLEN</b>	)
	)
<b>Defendant/Applicant</b>	) <b>OPPOSITION NO. 91186986</b>
	) <b>SERIAL NO. 77247611</b>
	)
	)
	<b><u>ANSWER</u></b>

Defendant Shaun Roberts Allen ("Allen"), by and through its below-identified attorneys hereby answers plaintiff Loest & McNamee's ("Loest") Notice of Opposition, and states as follows:

1. Allen is without sufficient knowledge or information to form a belief as to the allegations of paragraph 1 of the Notice of Opposition, and denies the same leaving Loest to its proof.
2. Allen admits the allegations of paragraph 2 of the Notice of Opposition.
3. Allen denies the allegations in paragraph 3 of the Notice of Opposition. He has applied to register the trade mark SILVER FERN and not FERNLEAF in International Class 33.
4. Allen is without sufficient knowledge or information to form a belief as to the allegations of paragraph 4 of the Notice of Opposition, and denies the same leaving Loest to its proof.
5. Allen is without sufficient knowledge or information to form a belief as to the allegations of priority of use contained in paragraph 5 of the Notice of Opposition, and denies the same leaving Loest to its proof.

6. Allen denies the allegations of paragraph 6 of the Notice of Opposition. Allen repeats that he has applied to register the trade mark SILVER FERN and not FERNLEAF in International Class 33.
7. Allen denies the allegations of paragraph 7 of the Notice of Opposition.
8. Allen denies the allegations of paragraph 8 of the Notice of Opposition. Allen repeats that he has applied to register the trade mark SILVER FERN and not FERNLEAF in International Class 33.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

9. There is no likelihood of confusion between the use of Allen's applied-for mark SILVER FERN and Loest's registered FERN mark 2906981. The Silver Fern is a well known indigenous plant which has been transformed into a nationally regarded symbol of New Zealand, the silver colour being its distinctiveness.

#### **Second Affirmative Defense**

10. Allen already has a history of use and rights to SILVER FERN pre-dating the Opposer's registration number 2906981. A copy of Allen's SILVER FERN trade mark registration in Class 32 is annexed hereto, being a class also relating to alcoholic drinks and products that subsist in the same retail and wholesale outlets as products in class 33. It can be seen that Allen applied for SILVER FERN in class 32 on 27 February 2002, some 4 months before Loest applied for FERN in class 33. Allen therefore has priority over Loest's registered mark and for alcoholic drinks and products reasonably related thereto.

#### **Third Affirmative Defense**

11. Allen repeats that he has applied to register the trade mark SILVER FERN and not FERNLEAF in International Class 33, as alleged by Loest.

Fourth Affirmative Defense

12. Loest's Notice of Opposition fails to set forth facts sufficient to entitle Loest to the relief sought, and therefore the Notice of Opposition should be dismissed.

Fifth Affirmative Defense

13. Loest is barred by the doctrines of waiver, acquiescence and estoppel.

WHEREFORE, having answered the Notice of Opposition, Allen prays that the opposition be dismissed, that its application register and for such other and further relief as the Board may deem just and proper.

Dated: November 24, 2008

Respectfully submitted,

Signed: .....

Jonathan Charles Heaphy BBS.,LLB.

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Attorneys for Defendant/Applicant

**Certificate of Service:** I certify that on the date below, this document and referenced attachments, if any, was deposited with the New Zealand Postal Service as first class

mail in an envelope addressed to: Paulette R. Carey, Buchman Law Firm, LLP, 510  
Thornall Street, Suite 200, Edison, NJ 08337, USA, and also emailed to  
prcarey@buchmanlaw.com

November 24, 2008 (USA Eastern time)

**Int. Cl.: 32**

**Prior U.S. Cls.: 45, 46 and 48**

**Reg. No. 3,057,060**

**United States Patent and Trademark Office**

**Registered Feb. 7, 2006**

**TRADEMARK  
PRINCIPAL REGISTER**

**SILVER FERN**

**ALLEN, SHAUN ROBERTS (NEW ZEALAND  
INDIVIDUAL)  
174 WAGHORNE STREET  
NAPIER, NEW ZEALAND**

**OWNER OF NEW ZEALAND REG. NO. 644397,  
DATED 10-7-2002, EXPIRES 10-7-2012.**

**SER. NO. 78-111,288, FILED 2-27-2002.**

**FOR: BEER; NON-ALCOHOLIC BEVERAGES,  
NAMELY, FRUIT JUICES AND BOTTLED WATER,  
IN CLASS 32 (U.S. CLS. 45, 46 AND 48).**

**DAVID TAYLOR, EXAMINING ATTORNEY**